IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 34/1996

Damodar Mangalji & Co. Ltd.,
Having its registered office at
Damodar Niwas, Mahatma Gandhi
Road, Panaji, Goa. 403 001. ..... Appellants.

V/s.

The Oriental Fire & General Insurance
Co. Ltd., now known as Oriental
Insurance Co. Ltd., having its Office at
Oriental Bldg., Mahatma Gandhi Road,
Fort, Bombay 400 001 and Branch Office,
Inter alia, at Salgaonkar Building,
Vasco da Gama, Goa. ..... Respondents.

Shri A.J. Kenkre, Advocate for the Appellants.

Shri F. M. Reis and C.S. de Silva, Advocates for the respondents.

CORAM : R.M. LODHA, J.

DATE : 25TH AUGUST, 2005.

ORAL JUDGMENT :

The original plaintiffs are in appeal being dissatisfied with the Judgment and Decree dated 13.10.1995 passed by the District and Sessions Judge, South Goa, at Margao, whereby the plaintiffs' suit for declaration that the defendants are bound to indemnify the plaintiffs under the Insurance Policy dated

24.12.1969 in respect of the claim against the plaintiffs by reasons of any loss or damage caused due to the operation of the barge “M.V. Prabhat” to the extent of Rs.5,00,000/- came to be dismissed.

2. On 2.11.1972, the plaintiffs filed the suit against the defendants (the respondents herein). The plaintiffs set up the case that they were owners of the barge known as “M.V. Prabhat (MRH 126)”. By an Agreement dated 6.8.1969 the plaintiffs agreed to sell the said barge to Prakashchand Jain and Jivanmal Jain for a consideration of Rs.4,00,000/-, payable in instalments stipulated in the said agreement. The possession of the barge was given to the purchasers on the date of the agreement. The plaintiffs had insured the said barge with the South British Insurance Company Limited but since the buyers insisted for insuring the said barge with the defendants, the proposal was sent on 13.8.1969. On 8.9.1969, the defendants issued a cover-note against the Standard Institute Time Clauses (Hulls) Risks from 13.8.1969 to 13.8.1970 whilst in navigation. The Insurance Policy was issued by the defendants on 24.12.1969. The issuance of the policy was delayed because the defendants had sought certain clarifications regarding the actual premium rates from the Tariff Advisory Committee. On 4.11.1969, the said

barge, while being navigated by the crew of the buyers, collided against the Borim Bridge causing damage and the two spans of the Borim Bridge were broken. The Union of India filed a Civil Suit against the plaintiffs, the purchasers, Master and the Engineer claiming compensation of Rs.24,00,000/-. The said suit was filed on 8.6.1972 and decreed by the District Judge, Margao on 11.2.1993. Thereby the present plaintiffs were directed to pay to the Union of India a sum of Rs.8,89,129.23 with interest at the rate of 6 % per annum from the date of the filing of the suit until the payment. In execution of the said Decree, the plaintiffs had to pay a total amount of Rs.22,33,283/- to the Union of India. According to the plaintiffs, at the time when the suit was filed by the Union of India third party proceedings were not available. That necessitated the present plaintiffs to file the present suit against the defendants to indemnify an amount of Rs.5,00,000/- under the Policy dated 24.12.1969 in respect of the claim made against the plaintiffs and interest thereon.

3. The defendants filed their written statement and denied the plaintiffs' claim. Inter alia, the defendants set up their defence that they were entitled to repudiate the said policy of insurance on account of two breaches committed by the plaintiffs; (one) that the barge `M. V. Prabhat' did not have a

Survey Certificate as provided under the Inland Vessels Act; and (two) that the master of the barge Rajaram Saunto was not qualified to man the barge at the relevant time inasmuch as did not have first class certificate.

4. On the basis of the pleadings of the parties, various issues were framed by the learned trial Court.

5. The plaintiffs in support of their case examined Deuji Vithaldas (PW.1) and produced documentary evidence. On the other hand, the defendants examined three witnesses, namely (1) Sataprakash Gupta (DW.1), (2) Jaime Alberto (DW.2) and (3) Agostinho P. Mascarenhas (DW.3). The defendants also produced documentary evidence.

6. The District and Sessions Judge, after hearing the arguments, dismissed the plaintiffs' suit on 13.10.1995.

7. Mr. A.J. Kenkre, the learned Counsel for the plaintiffs, assailing the Judgment of the learned trial Judge, submitted that the survey Form No.6 was produced to show that the barge was surveyed and declared fit for the period ending 31.5.1970. According to him, the Survey Form No.6 shows that the

dispensation of the Master expired on 31.5.1970. He referred to the evidence of DW.3 who was the Captain of Ports to show that there was paucity of First Class Masters and the Captain of Ports was granting dispensation of First Class Certificate. As per the deposition of DW.3, the learned Counsel would urge, the Second Class Masters were allowed to man the barge by dispensing with the First Class Master Certificate and at the time of the accident, the Master of the barge `M.V. Prabhat' was holding Second Class Master's Certificate. Relying upon the evidence of DW.3, the learned Counsel would submit that though he was witness of the defendants, the barge was certified fit till 5.7.1970. The Learned Counsel contended that since the claim of the plaintiffs was denied only on the two grounds set up by the defendants that the barge did not have fitness certificate and that the Master did not have First Class Master Certificate, from the evidence on record it is established that the barge `M.V. Prabhat' was fit and that First Class Master Certificate came to be dispensed with by the Captain of Ports and the concerned Master at the relevant time had the Second Class Master Certificate and was competent to navigate the barge.

8. On the other hand, the learned Counsel for the defendants referred to the letter dated 19.8.1974 received from

the Captain of Ports informing the defendants that in respect of barge “M.V. Prabhat” no survey certificate was issued, entitling the the said barge to ply on 4.11.69 (the date of the accident at Borim Bridge) and that the Master on the relevant date had Second Class Master Certificate and therefore was not competent to navigate the barge. He referred to the oral evidence of PW.1 as well as DW.3 and supported the findings recorded by the trial Court.

9. In sum, the thrust of the argument of the learned Counsel for the appellants was based on Form No.6 and the evidence of DW.3. I have to, therefore, consider whether from the Survey Form No.6 and the evidence of DW.3, the conclusion can be drawn that the barge had the fitness certificate and that the Master was competent to navigate the said barge on the date of the accident ?

10. The Survey Form No.6 appears to be a declaration under Section 7 of the Inland Vessels Act, 1917. Though it records that on 1.8.1969 inspection of the barge `M.V.Prabhat' was completed, the contents of various column show otherwise. In column 11 which relates to name of Master and description of certificate and number of officers and deck crew, the name of

Sacarama Fotto is shown. It mentions Grade of Certificate as IInd Class dated 3.9.1969. The dispensation of First Class Master Certificate was made with effect from 23.3.1970 upto 31.4.1970. Then in column 13 which refers to the place and the date where last examination of the vessel was done in dry dock, two dates are mentioned; (1) 6.7.69 at Ekoshi and (2) after accident with Borim Bridge on 15.1.70 at Goa Shipyard. If the inspection of the vessel was completed on 1.8.69, as is declared by the Surveyor, there was no question of mentioning that Master Certificate was issued on 3.9.69 and dispensation was made on 23.9.1970. Similarly, if the inspection was completed on 1.8.69 the Column no.13 would not contain that the vessel was examined after the accident with Borim Bridge on 15.1.70 at Goa Shipyard. On a close scrutiny of Survey Form No.6, I find that in fact the barge “M.V. Prabhat” was examined and certified after the accident had already taken place on 4.11.1969 and the declaration made therein that the inspection was completed on 1.8.69 appears to be false and incorrect. Moreover, under the Indian Vessels Act, 1917, after the declaration is made by the Surveyor under Section 7 of the said Act, the owner or the Master is required to forward the said declaration to the Competent Officer notified by the State Government within 14 days from the date of receipt of such declaration and thereafter

as provided in Section 9 of the said Act, the Competent Officer notified by the State Government causes a certificate to be prepared. Admittedly, there is no certificate as contemplated under Section 9 of the Indian Vessels Act, 1917 prepared in respect of barge "M.V. Prabhat". No such certificate had been produced by the plaintiff. The Certificate prepared under Section 9 of the Indian Vessels Act, 1917 could have shown whether the barge was fit for navigation or not.

11. It is pertinent to note that the Captain of Ports (**Captain L.B.P. Lobo)** by communication dated 19.8.1974 intimated to the defendants thus :

> " (1) No certificate of survey was issued in respect of barge M.V. Prabhat No.MRH-126 entitling the same barge to ply on 4.11.1969 the date of the accident at Borim Bridge.
>
> (2) That Shri Rajaram Saunlo holds holds 2nd class Master Certificate issued to him under No.1558 dated 6.1.1967."

The said document would clearly show that barge "M.V. Prabhat" was not fit for navigation for want of certificate to that effect and also the Master on the said vessel held Second Class Master Certificate and thereby not competent to navigate the said vessel. Much reliance was placed by the learned Counsel for the

plaintiffs-appellants on the deposition of DW.3 therein. The learned Counsel would contend that the fitness of the barge as given in Exhibit DW.3/A was restricted upto 31.5.1970 in view of the expiry of master's certificate as on 31.5.1970; other wise the barge was fit till 5.7.70. For the reasons which have already been indicated by me above, suffice it to say that the certificate Exhibit DW.1/A Form No.6 regarding fitness cannot be relied upon as the declaration was made on 9.4.1970 i.e. after the barge had already met with an accident. That the mention that the inspection was completed on 1.8.1969 is not acceptable being false and incorrect for the reasons already indicated by me. DW.3 was not the Captain of Ports at the relevant time i.e. for the period from 1.8.69 to 5.7.70 and, therefore, his statement that the barge was fit for navigation till 5.7.70 hardly merits acceptance. In his examination in chief, DW.3 stated that the subject-barge did not have survey certificate and a certified master on board. He admitted the correctness of the contents of Exhibit 18 which recorded that no certificate of survey was issued in respect of barge "M.V. Prabhat". Thus, from the evidence of DW.3, it can hardly be held that the subject-barge was fit for navigation or that First Class Master Certificate of Rajaram Saunto who was the master of the vessel was dispensed with. As a matter of fact, Survey Form

No.6 (Exhibit DW.3/A) records the name of Master as `Sacaram Fotto' having second grade certificate and the dispensation endorsed on 23.2.70 upto 31.5.1970. There is nothing on record to show that there was dispensation certificate granted by the Captain of Ports or Dy. Captain of Ports to Rajaram who at the relevant time, was the master of the said vessel.

12. The evidence on record thus clearly establishes (one) that the barge “M.V. Prabhat” did not have certificate of survey and (two) that Rajaram Saunto who was the master of the vessel had Second Class Master Certificate only and (three) that there was no dispensation of certificate by the Captain of Ports or Dy. Captain of Ports with regard to Rajaram Saunto. In this view of the matter, the defendants were rightly held by the trial Judge to be entitled to repudiate the policy on account of two breaches committed by the plaintiffs, namely (1) that the barge M.V. Prabhat did not have survey certificate and (2) that the Master of the Barge Rajaram Saunto was not entitled to navigate the barge at the relevant time.

13. The plaintiffs were, thus, not entitled to any decree against the defendants. The dismissal of the suit by the trial Judge does not suffer from any infirmity.

14. Resultantly, the first appeal is liable to be dismissed and is dismissed with no order as to costs.

R.M. LODHA, J.

Ssm.